the doctor refused to go near them for a period of several days; that he did not make regular rounds of the hospital to inspect those hospitalized there; that he insisted in giving oral directions for treatment and medication to the practical nurses and generally declined to give such instructions either to the head nurse or other graduate registered nurses in writing or by entries on the charts; that while he thus absented himself from the hospital he remained in his apartment and refused to see patients even when the nurses sought him out and requested his presence. During such times his wife, who was neither an employee nor a physician, made the hospital rounds in her husband's stead and undertook to give orders for treatment of the patients. The nurses testified as to how the doctor would schedule operations for morning hours, and then, after the patient had been prepared and wheeled into the operating room at the appointed time, the doctor would not appear until long after noon, and sometimes not at all on the appointed day.

The nurses testified that when it was necessary to procure directions from the doctor, they would proceed to the apartment in order to talk to him and that frequently the doctor was in the bathroom with the door closed, where he remained for long periods of time, and that they had to consult with him through the closed bathroom door. The nurses complained to Dr. Boice about the difficulty of procuring proper directions and about his refusal to see immates and callers at the hospital but the situation did not improve. At times when the doctor was in the hopsital and he was approached by a nurse in order to have him interview a patient, he climbed out of the window to get away from the

nurse and avoid the interview. Some of the nurses furnished additional details, such as the doctor's permitting his children, his dog, and his pet ducks to wander about the hospital.

Finally, some of the nurses reported the unsatisfactory condition to the Mining Company officers stating they proposed to resign. They were requested to stay until some replacement could be found for Dr. Boice. The contract of employment provided for termination of his two year term at any time on 60 days notice, and on April, 1948, he was given such notice.

Early in the following month he performed an operation said by him to be exploratory in character upon a woman who he said was suspected of having malignant cancer or tumor of the uterus. One of the nurses protested before the operation that the woman appeared to be pregnant, but the doctor, without making any tests for pregnancy, nevertheless proceeded with the operation. He performed a hysterectomy and removed the uterus which was found to contain a fetus which moved and kicked. The doctor admitted that he had not known that the pregnancy existed when the operation was performed, and the only point in controversy with respect to this operation was as to whether it was a six month or only a three month old fetus. The graduate registered nurses who were present and who saw the fetus and who had some years of training and experience in obstetrical techniques, testified that it was apparently a six-month fetus. The doctor proceeded immediately to dissect the uterus. The nurses were present as was a four year old child of the doctor during this procedure. Immediately thereafter the specimen disappeared

and although in a short while much controversy arose about the operation, the specimen was not exhibited to any other person. The doctor admitted that he kept it in alcohol until after he left Stibnite, and that he buried it in the vicinity of a ranch where he stopped on his way out following his discharge.

The head nurse testified that another patient in apparently the same condition as the woman thus operated upon was then in the hospital awaiting a similar operation. The nurse became much agitated about the incident just described and she went to the officials of the company advising them that in her opinion some "mad surgery" was going on; that the Mining Company was likely to be held responsible for some of the consequences and that the doctor should be removed from his responsibilities at once.

It was following this report that the company officers called the Idaho Department of Public Health which immediately sent a representative of the department and a physician member of the Hospital Advisory Board to Stibnite. The company officials then approached Dr. Boice, and in the presence of these persons demanded that he quit his employment and that he leave town at once.[1] It was in the course of the ensuing argument with Dr. Boice that the company officers are said to have expressed the opinion that the doctor was mentally ill and insane and to have stated he had performed an illegal operation.

The charge of slander arises out of these remarks. At

[1]Stibnite was a "company town" in the sense that substantially all of its inhabitants were company employees and their families, and substantially all of the houses and buildings were company owned.

first the doctor declined to accede to any termination of his employment and stated that he proposed to continue. It was then that a guard was stationed at the door leading from the apartment to the hospital to keep the doctor from entering the hospital. It was claimed that at the same time guards were placed near other outside doors of the apartment to prevent the doctor from leaving the apartment at all. The doctor himself testified that there were guards on those other sides of the apartment, but his wife gave no such testimony and other persons who were there saw no guards other than the one at the entrance of the hospital.

The charge of false imprisonment is predicated upon this claim that the apartment was surrounded by guards, and that when Dr. Boice and his family drove out of town the following Sunday night, an employee of the company followed to make sure that they did leave. It is not claimed that the imprisonment lasted more than a few hours, for during the evening following the time mentioned the doctor and his wife left the apartment and went about the town without any difficulty or interference. After some argument which followed the demand for Dr. Boice's immediate departure, he was finally paid compensation for a sixty day period which included compensation for the loss of the use of the apartment, and the doctor and his wife took their belongings and left Stibnite.

I have no difficulty in going along with the majority and with the trial judge upon the proposition that there was some evidence to prove an imprisonment[2] and that the

[2]The evidence of imprisonment was exceedingly flimsy. I do not think there was any, but of course I am not a fact finder here.

defamatory remarks made in the presence of the Health Department representatives could be said to have been made before persons with respect to whom the rule of privilege would not operate.

But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation.[3] What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties.

I think also it cannot be questioned but that when these matters were called to the attention of the Mining Company, its officers were justly and reasonably alarmed about the situation in view of the company's responsibility under its hospital management. The company officers would properly assume that the training in discipline of a graduate nurse is such that she would not be likely to question a doctor's actions unless his conduct had become actually shocking.

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[3] "In the actions mentioned in the last section, the defendant may in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances." Sec. 5-811, Idaho Code.

The testimony of these nurses did not stand alone. It was corroborated by the testimony of several of the practical nurses, and the doctor's inattention to his work and many of the inexplicable aspects of his often erratic and eccentric conduct and demeanor were testified to by many former inmates of the hospital. Many of these patients were at the time of the trial either company employees or members of their families, but it is noteworthy that in general the circumstances related by them were not denied. The doctor himself was not called upon rebuttal after all this testimony had been adduced.

I would be inclined, without more, to say that the verdict of $60,000 under the circumstances of this case is grossly excessive and monstrous. As I read the testimony I think it is apparent that when Dr. Boice was told to leave, the officials of the company who talked to him were not only alarmed but had become so excited that under the circumstances their method of approaching the doctor and demanding his departure was more abrupt and undiplomatic than it needed to be. I think that the only circumstances from which malice could be inferred in order to support an award of punitive damages is this unnecessarily harsh method of putting pressure upon him to leave, but I assume that there was sufficient evidence of malice to sustain an award of punitive damages, although the inference of lack of malice, I believe, is the stronger. Even assuming a permissible inference of malice, I think the award a monstrous one, wholly apart from the circumstances which I am about to mention.

In my opinion the record is so filled with matters improperly injected on behalf of appellee as to demonstrate what

I can only conclude were deliberate efforts to make appeals to the passion and prejudice of the jury. One of these instances is mentioned in the opinion of the majority, who apparently treated it as an isolated instance, of trifling consequence. I do not so read the record.

For instance, appellee's counsel no doubt felt that they should in some manner undertake to break down the effect of the testimony of the nurses to which I have referred. They proceeded to do this by propounding to each of them certain questions, which, if answered in the affirmative, would have disclosed that the nurse in question was very biased against the doctor, or had made prior statements contradictory of her present testimony. Thus Miss Morton, the nurse who had reported the operation to the company officials, was asked: "Miss Morton, immediately after your arrival on the 29th of April or the next day, or within a day or two, you started to criticize Dr. Boice to other nurses, did you not?" She was also asked: "Were you not also talking to the patients and criticizing the doctor's treatment of the patients?" Both of these questions were answered "No, sir", and in answer to the second, the witness said "I used all the excuses I could manage to cover up for Dr. Boice not seeing his patients". Now, if counsel was possessed of any evidence of any such conduct on the part of Miss Morton as that suggested by the question, which would have tended to show substantial bias on her part, proof of that fact would have been admissible. Collinger v. United States, (7 cir.) 50 F. 2d 345; United States v. Beekman, (2 cir.) 155 F. 2d 580; 3 Wigmore Evidence (Third Edition) § 1022. But no such testimony was adduced.

If only those two questions were involved, it is clear that their asking would be entirely proper, whether followed

by other proof or not. I think it would be taken that counsel would be presumed to have asked them in good faith.

The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury.[4]

The cross-examination of the other nurses followed the same pattern.[5] It was extended to other witnesses. A guard

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[4]Thus, still proceeding with the cross-examination of Miss Morton, she was asked: "Didn't you tell Mr. Provost [a hospital patient] that he should sue the doctor for malpractice?" Also, she was asked: "When the doctor asked you to leave didn't you tell him at that time that you were not working for him, and that he could not fire you, that you were working for Mr. Bailey?" Also: "Did you tell Helen Christensen that you were not employed by Dr. Boice but were employed by Mr. Bailey?" In each case the answer was in the negative. Some of the suggestions in these questions to Miss Morton were repeated in questions to other nurses. Mrs. Anaruk [formerly Miss Haskins] was asked: ". . . Were you ever present, during your period at the Stibnite Hospital, when Miss Jeanne Morton made statements to Mr. Provost criticizing Dr. Boice when Dr. Boice was not present?" The same witness was asked if Miss Morton had not told her she was hired "for the purpose of constantly checking on Dr. Boice and reporting back to [company officers]". Mrs. Richardson was asked: "Do you know whether or not Miss Morton, during that entire period, was extremely critical of Dr. Boice to you and the practical nurses and also the patients involved?"

[5]Nurse Anaruk was twice asked whether she had not, shortly after Dr. Boice left, stated to one Faye Anderson, that she "had never seen anything like the treatment accorded Dr. Boice by the Bradley Mining Company or their agents", and that she was going to quit because she "did not like the way they treated Dr. Boice". Nurse Lee was asked if she, about that time, did not go to Dr. Boice to express her sympathy, and did not then say "he was the best surgeon [she] had ever known". Nurse Kirshner was asked if she had not made two purported statements. If these statements had been made they would have indicated that this nurse told a Mr. Sims, while he was in severe pain, to get up and get out of the hospital, and that she made a similar statement to a Mrs. Baker,

stationed at the hospital door was asked about a conversation with a Mr. and Mrs. Ross. He was then asked: "Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guard, and that you had instructions to shoot him down like a dog if he got funny?" Martin, the county attorney, was asked on cross-examination if he did not state to Dr. and Mrs. Boice that "it was silly for them to fight Mr. Bradley and his money."

These instances will serve to illustrate the method of cross-examination adopted by the doctor's counsel. Many other similar instances are listed and complained of by appellant. In no instance was any effort made to prove, by calling any other witness, that the suggested prior contradictory statement, or statement disclosing bias, had actually been made. The conclusion seems unavoidable that such questions were not asked in good faith, or in the belief that they referred to any actual occurrence, or that any such statements had actually been made, but rather that they were asked in a studied attempt to prejudice the jury by the innuendo which was certain to be the effect of the mere interrogation. As the Supreme Court of Montana said of a somewhat similar procedure, "Manifestly it was the questions and not the answers which counsel considered important." State v. Patton, 102 Mont. 51, 59, 55 P. 2d 1290, 104 A.L.R. 76. Cf. United States v. Nettl, (3 cir.) 121 F. 2d 927.

When the evidence came to a close and it then became apparent that appellee did not intend to produce witnesses

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hospitalized for hypertension. The same nurse was asked if there was not friction between herself and the head nurse, Mrs. Johnson. Nurse Johnson was asked if she had not said of Nurse Kirshner that the latter "was in disgrace in the nursing profession".

to prove the statements thus insinuated in the questions, appellant might well have moved the court to direct the jury to disregard the questions. The Idaho court has held that without such a motion, the asking of the questions, or the failure of the court so to instruct, is not ground for reversal,[6] although that court has labeled such a procedure as that indulged in by appellee's counsel here, as "unfair to a defendant", a practice which "ought not to be indulged in under any circumstances", State v. Boyatt, 59 Ida. 771, 784, 87 P. 2d 992, and as a "reprehensible practice", State v. Flitton, 52 Ida. 374, 379, 15 P. 2d 397.[7]

But as I read this record, I think it immaterial whether appellant, by not making such a motion, lost the right to demand a new trial for misconduct of counsel as such. The important fact is that this highly prejudicial matter was improperly before a jury which has produced a very large verdict. It serves to account for the size of the verdict. It is all of the same stripe as the conduct of appellee's counsel in having a witness relate, without any showing that it related to this case, a purported conversation between two of appellant's officers in which one asked "Do you think his word would stand up?" And the other replied, "No, he is just a common laborer". In like manner, a witness was asked if she knew that when the Boices left, Mrs. Boice was pregnant. No one testified to such a pregnancy. I cannot

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[6]But as to whether, at such a late hour in the trial the effect of the questions could be removed by an admonition, see United States v. Grayson, (2 cir.) 166 F. 2d 863, 871, Waldron v. Waldron, 156 U. S. 360, 383.

[7]In a lengthy effort to justify his procedure, appellee cites decisions to the effect that the purpose of cross-examination is to show bias, to show previous contradictory statements, to place the witness in his proper setting, to modify or explain the testimony, etc. It is claimed that the cross-examination here was to show these things. The fallacy of that argument here is that none of those things were shown. They were only insinuated.

escape the conclusion that this question, and the conversation about "just a common laborer", and the question about a company official rejecting a proposed employee because she was Jewish, were all dragged in merely for their likelihood to cite passion and prejudice.

A jury cannot be expected to make a calm, judicious and fair appraisal of damages in such an atmosphere. It is apparent that this one did not. Where an excessive verdict thus results from passion and prejudice, the error cannot be cured by remittitur. A new trial must be granted, for the means employed at the trial "may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." Minneapolis etc. Ry. v. Moquin, 283 U. S. 520.[8]

In my opinion a very thin case has here been whipped into a monstrosity. I think a new trial should be ordered.

(Endorsed:) Opinion and Dissenting Opinion. Filed Dec. 5, 1951, Paul P. O'Brien, Clerk.

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[8]I think, also, there is a nice question whether the trial judge did not erroneously refuse to exercise his discretion to grant a new trial, because he mistook his power to do so in a case where the verdict is against the weight of the evidence. In his opinion denying a new trial, after referring to the Constitutional right of trial by jury, he said: "If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before this court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury." This sounds like the statement of the trial court which led to reversal in Felton v. Spiro, (6 cir.) 76 F. 576, which was cited with approval in Fairmount Glass Works v. Coal Co., 287 U. S. 474, 481. The Constitutional right to trial by jury, mentioned by the trial judge, includes the right to a trial under the direction of a judge empowered to grant a new trial when he believes the verdict is against the weight of the evidence. Capital Traction Co. v. Hof, 174 U. S. 1, 13. This is "one of the historic safeguards of that right." Aetna Casualty & Surety Co. v. Yeatts, (4 cir.) 122 F. 2d 350, 352. Cf. Southern Pac. Co. v. Guthrie, (9 cir.) 186 F. 2d 926, 932.

Appendix B

United States Court of Appeals for the Ninth Circuit

BRADLEY MINING CO., a corporation, *Appellant,* vs. EDWARD H. BOICE, *Appellee.*	No. 12,684 Aug. 27, 1952

BEFORE: HEALY, BONE, and POPE, Circuit Judges

PER CURIAM

In this case we affirmed a judgment against the appellant, one member of the court dissenting. 194 F. 2d 80. Appellant petitioned for a rehearing in banc, and rehearing was denied. Application for certiorari followed and was denied. 343 U.S. 941. Upon the coming down of the mandate appellant moved for leave to file a motion to vacate the denial of its petition for rehearing in banc and for the reinstatement of its petition. That motion is the matter before us for disposal.

The case was not in any aspect of such character as to suggest the advisability of its being heard or reheard in banc. It involved purely factual issues. Depending upon how the jury might evaluate the evidence, or how appraise the credibility of the witnesses, it was concededly a case in which both actual and exemplary damages were awardable. The charges made against the defendant, and presumably accepted by the jury as true on the evidence before it, were for conduct of a nature calculated to blast at the threshold

the efforts of a young doctor to establish himself in his profession. The problem presented bore scant resemblance to Southern Pacific Co. v. Guthrie, 186 F. 2d 926, and speculation as to the probable attitude here of the judges who participated in *Guthrie* has no perceivable basis.

The judge who presided at the trial, convinced that the jury was not motivated by passion or prejudice and that its verdict, while large, was not excessive, denied a motion for a new trial.* Being ourselves disinclined to usurp the functions of the jury or to invade the province of the district judge, and being, moreover, of opinion that the judge was right in refusing to disturb the verdict, we affirmed. Appellant has had its appeal and its opportunity for certiorari or other relief in the Supreme Court. It is not entitled to pursue the process a second time.

The motion for leave to file is denied.

POPE, Circuit Judge, dissenting.

I think that a just disposition of this case requires that the appellant be granted an opportunity to reargue the case before the court sitting in bank.

In a recent opinion of this court in bank in Western Pacific Railroad Corporation, et al., appellants, v. Western Pacific Railroad Company, et al., appellees, No. 12506, handed down July 9, 1952, the court, after denying the right of a defeated litigant to require all of the judges of the court to consider a petition for rehearing of a case originally heard by a division of the court, pointed out that it recognized that certain cases are appropriate ones for consideration by a court in bank. The opinion enumerated cer-

*92 F. Supp. 750.

tain types of cases which have frequently been treated in this manner.†

In my opinion the circumstances make this particular case, in the light of the views expressed by all the members of the court with respect to some of the problems here involved, one in which a hearing in bank should be granted. I think that we, as members of this division which heard the case originally, should recommend a hearing in bank and by our action invite all the judges to participate.

My views in this respect are not based upon the mere fact that I have disagreed with the result reached in the majority opinion here, nor upon my feeling that a grave miscarriage of justice has been given the stamp of approval by this court. Rather my views are based upon the demonstrable probability that were this case heard by all seven

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†I have a somewhat different view of the purport of the opinion in the Western Pacific Railroad Corporation case mentioned above than that which Judge Denman expressed in his dissent in that case. As I understand the majority opinion, it went no further than to hold that a disappointed litigant in the position of the appellant in that case could not, by filing a petition for rehearing in bank, require all the judges of the court to consider and pass upon that petition. I concurred in that opinion because in my mind a contrary holding would mean that the court would, as a practical matter, lose the opportunity which it now has to expedite its disposition of cases through the hearing of matters before divisions. For instance, in the present case the record fills four printed volumes comprising nearly 2000 pages and I know what a task it was to read that whole record. I do not think the statute intended that I, not a member of the division which heard the Western Pacific case, should have to read all the record in that case, as I might well find necessary in order to vote intelligently upon the petition.

There is language in subdivision (c) of § 46 of Title 28 which would seem to grant to a majority of the circuit judges of the circuit the right to order a hearing or rehearing in bank in any case, a procedure which I am of course not proposing here. That is a question which was not determined by the majority opinion in the Western Pacific case, although Judge Denman seems to think that it was. Upon that question I reserve judgment until such time as determination becomes necessary.

judges a different result would be achieved. A study of the views expressed by all seven of the judges in Southern Pacific Company v. Guthrie, 186 F. 2d 926, (1951), will disclose why I think it evident that a hearing in bank would produce a different result.

As I have pointed out in my previous dissent in this case, the verdict upon which judgment has been entered here has the vice not merely of being excessive in amount but its validity is tainted by the errors in injecting into the case matters highly prejudicial and calculated to arouse the passion and prejudice of the jury. It is a stronger case than was Guthrie.

The point that I am making is that in any case where the division hearing the matter can say that there is a fair probability that all seven of the judges would arrive at a different conclusion than that expressed by a mere majority of a division, the case is an appropriate one for a hearing in bank. It is unthinkable to me that a division of the court may lay down a rule or enter a judgment knowing that a majority of the judges who constitute this court would probably disagree. That is this case and for that reason I think that a rehearing should be granted.

(Endorsed:) Per Curiam Opinion and Dissenting Opinion of Pope, C. J. Filed Aug. 27, 1952. Paul P. O'Brien, Clerk.

Appendix C

United States Court of Appeals
for the Ninth Circuit

BRADLEY MINING COMPANY, a Corporation, *Appellant,* vs. EDWARD H. BOICE, *Appellee.*	No. 12,684 Jun. 24, 1953

Appeal from the United States District Court, for the District of Idaho, Southern Division

BEFORE: HEALY, BONE and POPE, Circuit Judges

PER CURIAM

Upon the original calendaring of this case it was duly assigned for hearing and decision to a division of the court consisting of Circuit Judges Healy, Bone and Pope. For that purpose, the division constituted the court. After hearing the judgment of the district court was affirmed. 194 F 2d 80. Subsequently, on January 18, 1952, appellant filed a petition entitled "Petition for a rehearing en banc." On January 23, 1952, the division made and entered an order denying the petition.

Thereafter appellant petitioned for certiorari and by order entered May 5, 1952, 343 U. S. 941, the Supreme Court denied certiorari. Upon the coming down of the mandate appellant moved for leave to file a motion to vacate the denial of its petition for rehearing en banc and for the reinstatement of its petition. On August 27, 1952, the division denied the motion for leave to file, one judge dissenting. 198 F. 2d 790.

On April 13, 1953, the Supreme Court vacated its denial of certiorari, granted the writ, vacated the order of the division of this court denying the petition for rehearing en banc, and remanded the cause for further proceedings in light of Western Pacific Railroad Corp. v. Western Railroad Co., 345 U. S. 247, decided April 6, 1953, 345 U. S. 932.

Thereafter on May 27, 1953, this court's Rule 23 (formerly Rule 25) was amended by adding thereto two new paragraphs reading as follows:

> "All petitions for rehearing shall be addressed to and be determined by the court as constituted in the original hearing.
>
> "Should a majority of the court as so constituted grant a rehearing and either from a suggestion of a party or upon its own motion be of the opinion that the case should be reheard en banc, they shall so inform the Chief Judge. The Chief Judge shall thereupon convene the active judges of the court and the court shall thereupon determine whether the case shall be reheard en banc."

Pursuant to the decision of the Supreme Court of April 13, 1953, and this court's Rule 23, as amended, appellant's petition for rehearing en banc has been considered by this court as constituted in the original hearing, and this court as so constituted being of the opinion that the case should not be reheard en banc or otherwise, it is now ordered by this court as so constituted that the petition be and is hereby denied.

POPE, Circuit Judge, dissenting.

I have twice stated my reasons for dissent in this case, (194 F. 2d at p. 84; 198 F. 2d at p. 791). Why I disapprove the performance which passed for a trial in the court below

have been fully explained. Much as I deplore what has happened here, it is assuredly not on my conscience.

The majority of this division have undertaken to justify their affirmance of the judgment, and denial of a rehearing, either en banc or otherwise, on the ground that the case "involved purely factual issues". (198 F. 2d at p. 791). In my opinion, that is simply not true. The question is whether a litigant in a federal court is entitled to have the judges, both trial and appellate, exercise their constitutional power, and perform their duty, to pass judgment.

Although this is a case which got in the federal court by reason of diversity of citizenship, in my view it poses an important federal question relating to the function of a trial judge. In denying a motion for new trial on the ground of the excessiveness of the verdict, the trial court said, (92 F. Supp. at p. 755): "At the very threshold of this inquiry it must be remembered that the Constitution of the United States, Amendment 7, and of this State, art. 1, § 7, as well as all other States, has secured the right of trial by jury in civil actions by the words, 'shall be preserved', or, as stated in the Constitution of the State of Idaho, 'shall remain inviolate'. If this mandate is to be obeyed the Court must proceed with caution when a motion such as is now before this Court is considered, with the thought in mind that if the Court is going to set aside the verdict for no reason except that the Court feels it is excessive, this constitutional provision will be violated and a jury trial would be a useless thing if in the final outcome the Court could supplant its opinion in place of the opinion of the jury."

Most assuredly this is not the law. Murphy v. United States District Court, 9 cir., 145 F. 2d 1018, 1020; Charles v.

Norfolk & Western Ry. Co., 7 cir., 188 F. 2d 691, 695; Felton v. Spiro, 6 cir., 78 F. 576, 581. And the trial court, proceeding upon this mistaken premise, after discussing the size of the verdict, concluded that "the amount of damages allowed was the jury's best judgment," (92 F. Supp. at p. 756).

That the appellant was entitled to more than that, and that such mistaken renunciation of power by the trial judge is reversible error, was decided in Felton v. Spiro, supra, by a court of which Judges Taft and Lurton were members, in which it was said: "But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. If, now, in exercising this discretion, it is the duty of the court to consider whether the verdict was against the great weight of the evidence, and he refuses to consider the evidence in this light on the ground that he has no power or discretion to do so, it is clear to us that he is depriving the party making the motion of a substantial right, and that this may be corrected by writ of error." (78 F. 581.)

For this reason alone the case should have been reversed and remanded.

In Southern Pac. Co. v. Guthrie, 9 cir., 186 F. 2d 926, all the judges of this court, with one exception, reaffirmed the rule of this circuit, that an appellate court has the power to do something about a monstrous verdict. Appellant had a right to have his case submitted to judges who follow that

rule. I have previously stated why I think a study of the various opinions in that case will demonstrate that a hearing of this case en banc would produce a different result. In those circumstances, I say again, it is our duty to afford appellant that opportunity.

In a memorandum recently prepared by a committee of circuit judges for presentation to Congress, the following statement is found: "It need hardly be emphasized that the services performed by the judges of the federal courts is second to none in this country in its importance to the Nation. As Chief Justice Marshall said, 'The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all.' In the words of the late Mr. Justice Sutherland, 'If the political structure erected by the fathers rests upon any one pillar more securely than upon another, it is upon that which upholds the right of the individual to invoke the judgment of the civil courts of the land upon his conduct.'"

I think that no one will question what is there stated. But to the appellant in this case, this must sound pretty hollow. For as I see it, both the trial judge and the judges of this court, have simply refused to function.

(Endorsed:) Per Curiam Opinion and Dissenting Opinion. Filed Jun. 24, 1953. Paul P. O'Brien, Clerk.

Appendix D

EXAMPLES OF INFLAMMATORY CROSS-EXAMINATION BY COUNSEL UNDER GUISE OF IMPEACHMENT

The numerous examples of inflammatory "impeachment" cross-examination, not followed up by counsel have been referred to in part in our brief, supra. For convenience in checking the record, these examples are set forth in this Appendix with citations to pages in the transcript.

(1) The interjection of religious prejudice into the cross-examination of Mr. Bailey, the mine manager, (as to a nurse applicant being turned down because she was a Jewish refugee) is mentioned in our brief—a full record statement of this follows—this took place during the cross-examination by appellee's counsel of Mr. H. D. Bailey relating to a conversation between Mr. Bailey and the Doctor regarding the hiring of Miss Morton, the head nurse (1602, 1603):

"Q. What did you do at the office after you got there with Dr. Boice?

A. The Doctor asked my opinion of the three nurses, and I told him that it was his affair, that he had to work with them, that it wasn't my affair at all.

Q. Did you go over the applications?

A. I didn't see the applications—he talked with them informally; there were no formal applications.

Q. Did he discuss their qualifications with you?

A. No, I don't think so.

Q. Do you recall Miss Hirst that was brought in?

A. I think she was one—she may have been there.

Q. She was a **Jewish refugee,** was she not?

A. I don't know.

Q. You remember the Doctor told you that in addition to her training that she had three years of medical training?

A. No, I don't remember that.

Q. And that she would be a valuable asset, would be a help to them?

A. As I recall the Doctor said Miss Morton had the better qualifications.

Q. Isn't it a fact that you said Miss Hirst would not fit into the picture at Stibnite, and 'You better forget her'?

A. No, sir.

Q. You don't recall saying that—saying that inasmuch as she was **Jewish**, and a **Jewish refugee**, that she would not fit into the life at Stibnite and that you may as well forget her?

A. Nothing was said about being Jewish."

Counsel put on no witnesses to testify to the above comment and Respondent himself did not take the stand on rebuttal.

Many other instances of similar cross-examination occur in the record—some amounting to testimony by counsel under the guise of impeachment, and others of unquestionable impeaching character—all without foundation in the record, with no attempt at substantiation by counsel. It is obvious, therefore, the counsel intended throughout cross-examination to influence the jury by reckless and groundless inflammatory cross-examination—substituting in effect counsel's own testimony for respondent's case.

(2) See the cross-examination of Mr. Zarybnisky (1418-1419):

"Q. Do you know Mr. and Mrs. Cliff Ross?

A. Yes, sir.

Q. Were they at your home on Saturday?

A. I don't remember.

Q. Were they at your home on Sunday?

A. They were at our home.

Q. Do you remember—on Sunday going into their home and in the presence of Mr. and Mrs. Cliff Ross and your wife, stating that you had just been told that 'Doc had gone crazy'?

A. I don't remember.

Mr. Breshears: We object to this, there is no connec- with management or any of the defendants here.

"Mr. Hawley: *It is for the purpose of impeachment.*

The Court: *You may ask for that purpose.*

Q. *Do you remember on that occasion that you said Doc had gone crazy, and that you had instructions to keep him under guards, and that you had instructions to shoot him down like a dog if he got funny?*

A. No, sir, I don't."

This it will be noted is an instance where the right of counsel for respondent to ask the question was challenged by objection, and counsel made the specific promise to the court that he would follow through with the necessary proof.

Neither Mr. nor Mrs. Ross, nor any other witnesses who were put on the stand, substantiated counsel's "purpose of impeachment" as promised the court. Counsel's purpose was obviously without foundation, to get over the effect of the *question* to the jury.

(3) Mr. Martin, the Valley County prosecuting attorney, was asked "Did you state it was silly for them to try to fight Mr. Bradley and his money?" (1326);

(4) Mrs. Keele, the Boices' housekeeper, was asked "Did you at a time in May of 1948, know that Mrs. Boice was *pregnant?*" (760).

Neither respondent nor Mrs. Boice, nor anyone else, testified as to any such pregnancy—nor is there anything whatever in the record to indicate that the officials of the company were told, suspected, or knew of any such condition, if in fact it existed. This is another highly inflammatory instance of counsel's blueprint for prejudicing the jury.

Attention should be called here to the uncontradicted and unimpeached testimony of four graduate registered nurses and several practical nurses—and to the "impeaching" tactics of counsel. As to this see Judge Pope's comment (App. A, p. 9 ff):

> "But, with respect to the amount of damages, the Mining Company had the right, under the Idaho statute, to show the matters testified to by the nurses by way of mitigation. What impresses me is that the testimony of these four graduate registered nurses was not impeached in any manner. They were wholly disinterested when they testified, none of them is shown to have had any motive to misrepresent, and what is more, their testimony was not even denied. Under these circumstances, I think the court was obliged to assume that their testimony was true and, if it was true, there was assuredly something gravely wrong about the conduct of the appellee doctor in and about the performance of his duties. . . . Appellee's counsel no doubt felt that they should in some manner undertake to break down the effect of the testimony of the nurses to which I have referred. They proceeded to do this by propounding to each of them certain questions, which, if answered in the affirmative, would have disclosed that the nurse in question was very biased against the doctor, or had made prior statements contradictory of her present testimony. . . . But no such testimony was adduced.

The record here, however, shows a pattern of similar inquiries so repetitive, and so completely unsupported by any attempt to establish the suggested impeachment otherwise than by the mere asking of the questions, that the only fair conclusion, I think, is that they show a deliberate effort to inject, not by proof, but merely by innuendo, matters calculated to give rise to passion and prejudice on the part of the jury."

(5) Counsel's "impeaching" tactics reached a reckless peak in order to discredit Miss Morton—obviously due to the fact that she, as head nurse with 17 years of wide experience, divulged to management facts which led the company to act immediately to complete the April 30th termination of respondent's employment. In addition to the examples given above, see the following "discredit by question" without any foundation (1025):

"Q. Miss Morton, immediately after your arrival on the 29th of April, or the next day, or within a day or two, you started to criticize Dr. Boice to the other nurses did you not?

A. No, sir.

(6) Q. Were you not also talking to the patients and criticizing the doctor's treatment of the patients?

A. No, I used all the excuses I could manage to cover up for Dr. Boice not seeing his patients." (1025)

Further steps were taken to introduce a "company spy" theory with regard to nurses to prejudice the jury—(7) "Did you tell Helen Christensen that you were not employed by Dr. Boice but were employed by Mr. Bailey?" (Miss Morton 1022);

(8) "When the doctor asked you to leave, didn't you tell him at that time that you were not working for him and that he could not fire you, that you were working for Mr. Bailey?" (Miss Morton 1113, 1114);

(9) "Is it not a fact that Miss Jeanne Morton stated to you during the period of your employment at Stibnite, that she was hired as head nurse by B. F. Mahoney and H. D. Bailey for the purpose of constantly checking on Dr. Boice and reporting back to them?" (Mrs. Anaruk 1152).

(10) Mr. Mahoney, the personnel manager, was asked "As a matter of fact at times when nurses were employed there and got their slips from you, you told them to watch what was going on and report to you?" (487)

(11) "Were you ever present, during your period at the Stibnite Hospital, when Miss Jeanne Morton made statements to Mr. Provost criticizing Dr. Boice when Dr. Boice was not present?" (Mrs. Anaruk 1149)

(12) "Do you know whether or not Miss Morton, during that entire period, was extremely critical of Dr. Boice to you and the practical nurses and also the patients involved?" (Mrs. Richardson 1228)

To inflame the jury against the nurse witnesses—see

(13) "Didn't you tell Mr. Provost that he should sue the doctor for malpractice?" (Miss Morton 1025);

(14) "Had you, prior to May the 14th, 1948, known that there was a great deal of friction between Miss Morton, Dr. Boice and some of the nurses in the hospital?" (Mr. Mahoney 514);

(15) "Was it in the doctor's orders that he (Mr. Sims) was to receive this sedative for relief * * * didn't you refuse to give it to him?" (Miss Kirshner 833, 834);

(16) "Isn't it a fact that you told her (Mrs. Baker—a patient) in the presence of Helen Christensen, one of the nurses up there, that she should get out of the hospital, that there was nothing wrong with her?" (Miss Kirshner 852);

(17) "Shortly after Miss Kirshner arrived at the hospital, do you recall telling Helen Christensen that she was in disgrace in the nursing profession?" (Mrs. Johnson 963);

(18) "Is it not a fact that Mrs. Bishop (the surgery patient in May, where plaintiff did not change his torn glove) had knowledge that Bradley Mining Company desired to terminate Dr. Boice's services, and that she insisted that Dr. Boice perform the operation prior to his leaving Stibnite?" (Mrs. Anaruk 1149);

(19) "Is it not a fact, that after the employment of Dr. Boice was terminated by the Bradley Mining Company you stated to Faye Anderson, within a few days thereafter, that you had never seen anything like the treatment accorded Dr. Boice by the Bradley Mining Company or their agents?" (Mrs. Anaruk 1146);

(20) "Is it not a fact that you told Faye Anderson, in the presence of other practical nurses, within a few days after Dr. Boice's termination at the Stibnite hospital, that you were going to quit your employment with the Bradley Mining Company because you did not like the way they treated Dr. Boice and that you wanted no part of a hospital setup where such a thing could happen?" (Mrs. Anaruk 1146).

(21) Nurse Lee was asked if she, about that time, did not go to Dr. Boice to express her sympathy, and did not then say "he was the best surgeon [she] had ever known." (1189)

Counsel put on no witnesses and no evidence to support or to follow through on the above questions which were denied. The plaintiff himself did not take the stand on rebuttal, nor did his three nurse witnesses, Faye Anderson Nock, Helen Christensen, or Zina Gubser give one word of testimony to substantiate this "impeachment" cross-examination.

(22) To inflame the jury against the defendant company regarding the placing of guards in the hospital to keep plaintiff from the patients, defendant John Bradley was asked with regard to Mrs. Wood, from whom the fetus had been taken,—"As a matter of fact, as a result of delay in care and being without attention, this patient had a slight infection set in in her wound?" (Mr. Bradley 1837).

Counsel called Mrs. Wood and her husband in rebuttal but did not even attempt to fill in the suggested impeachment.

(23) Counsel went to great lengths to get before the jury a purported conversation between officials of the defendant company in which someone allegedly asked the question "Do you think his word would stand up?", with the answer "No, he is just a common laborer" (319, 345, 1676, 1824, 1943).

There was no showing whatever that this purported conversation—allegedly "overheard" by a witness in another room—had any relation to this case.

The same pattern of suggested and innuendo by cross-examination under the guise of impeachment occurs in at least 30 additional places in the record—there are in all over 52 such examples. See:

Defendant Bradley 1777, 1778, 1779, 1827, 1841; Mahoney —personnel manager—498, 499, 500, 501; Bailey—mine manager—1614, 1615-1619, 1625, 1639, 1640, 1677; Mrs. Keele—plaintiff's housekeeper—758, 759; Nurse Kirshner 852, 853, 854, 855; Nurse Johnson 960, 961, 965; Nurse Morton 1045, 1045-1055, 1077; Nurse Anaruk 1145, 1146, 1147; Nurse Lee 1188, 1189; Mossman—County Sheriff—1261, 1262; Logue—deputy Sheriff—1477, 1494; Dr. Lowe—a psychiatrist flown in by the Company—1962, 1963.

These matters wrongfully injected into the record were so inflammatory and prejudicial that the effect thereof could not have been removed by motions to strike or instructions to disregard. It was not possible to object to the questions asked ostensibly for purposes of impeachment.

If the appellant at the close of the case had moved that these matters be stricken, and the court had stricken each and every one and instructed the jury to disregard the same, such action would have served but to emphasize them.*

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*"Indeed as experienced trial lawyers have often observed, merely to raise an objection to such testimony—and more to have the judge tell the jury to ignore it, *often serves but to rub it in.* Judge Frank in *U. S. v. Grayson* (C.C.A. 2) (1948) 166 F.2d 863, at 871.

"It certainly cannot be said that such testimony would not unconsciously affect the verdict however much the jury might be disposed to follow the instructions of the court." (*Lockhart v. U. S.* (C.C.A. 9) (1929) 35 F.2d 905)

Inflammatory matter injected into a record may be so prejudicial that its sting cannot be removed by admonition or instruction. See *Waldron v. Waldron,* 156 U.S. 360, 383.